D.T.E. 00-54-B November 28, 2001

Petition of Sprint Communications Company L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon New England, Inc. d/b/a Verizon-Massachusetts.

ORDER ON COMPETING LANGUAGE AND SPRINT'S MOTION TO STRIKE

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ORDER ON COMPETING LANGUAGE AND SPRINT'S MOTION TO STRIKE

I. INTRODUCTION

On December 11, 2000, the Department of Telecommunications and Energy ("Department") issued an Order in the above-referenced arbitration[1] between Sprint Communications Company, L.P. ("Sprint") and Verizon New England, Inc. d/b/a Verizon Massachusetts[2] ("Verizon" or "Company") (collectively, "Parties") ("Sprint Order"). In the Sprint Order, the Department made findings necessary to finalize an interconnection agreement ("Agreement") between the Parties, and required the parties to file a completed interconnection agreement with the Department within 21 days of the date of the Order.

On January 2, 2001, Sprint filed a Motion for Reconsideration of the Sprint Order. On May 3, 2001, the Department denied Sprint's Motion for Reconsideration and ruled on two evidentiary motions. D.T.E. 00-54-A (2001). In this second Order, the Department again required Sprint and Verizon to file an interconnection agreement within 21 days from the date of the Order.

The Arbitrator subsequently granted the parties two extensions of time to file a completed interconnection agreement. The parties were unable to conclude negotiations, and on June 21, 2001, filed another Motion for Extension of Time. On June 28, 2001, the Arbitrator issued a Ruling denying the parties' Assented to Motion for Extension of Time. In the Ruling, the Arbitrator required the parties to file competing contract language for

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[1] This arbitration proceeding is held pursuant to the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 252.

[2] Formerly, Bell Atlantic-Massachusetts.

unresolved issues, along with supporting documentation indicating each party's understanding of the nature of the disagreement. The Arbitrator stated that the Department would select the appropriate language to be included in the interconnection agreement, and direct the parties to sign a final interconnection agreement.

On July 19, 2001, the parties filed competing language and supporting documentation on three unresolved issues. The parties ask the Department to address the following issues: (1) revisions to reciprocal compensation and local traffic definition to incorporate a recent Federal Communications Commission ("FCC") Order; (2) Verizon's right to collocate at Sprint's facilities; and (3) the price Sprint charges Verizon to supply entrance facilities.

On August 10, 2001, Verizon filed additional revised language intended to "more clearly define the traffic that is subject to reciprocal compensation." On August 14, 2001, Sprint filed a Motion to Strike ("Motion") the revised language, and a response to Verizon's revised interconnection agreement language. On August 20, 2001, Verizon filed a Reply to Sprint's Motion to Strike.

II. MOTION TO STRIKE

In its Motion, Sprint asks that the Department strike Verizon's August 10, 2001 revisions because they were filed more than three weeks after the deadline set by the Arbitrator for competing language submissions (Motion at 1). Sprint argues that Verizon had the opportunity to present its position on remaining disputed issues, and points out that Verizon provided no explanation why its revised language was not included in its July 19th filing (id. at 2). Sprint asks that the Department decide the unresolved issues on the record as of July 19,

2001 (id.).

Verizon argues that it submitted the revised language in order to incorporate the FCC's Order, which became effective June 14, 2001, establishing new reciprocal compensation rules (Verizon Reply at 2). According to Verizon, the revised language reflects negotiations with competitive local exchange carriers ("CLECs") after July 19th, and is an "improvement" over language submitted on July 19th (id.). Verizon contends that Sprint has failed to provide a valid reason to strike Verizon's revised language, and that Sprint was not prejudiced by this revised language (id. at 1-3). Verizon argues that the Department should reject Sprint's Motion, and adopt Verizon's revised language in the parties' interconnection agreement[3] (id. at 9).

Verizon submitted its revised language three weeks after the deadline set by the Arbitrator for such filings, and without a motion for an extension of the deadline. As an initial matter, Verizon's filing is procedurally deficient. Verizon's filing is untimely, and should have been preceded by a motion for extension of time. See 220 C.M.R. § 1.02(5) (request for an extension of time shall be made by motion before the expiration of the period originally prescribed).

In addition to the procedural irregularity, Verizon did not establish good cause because it failed to identify an adequate reason for late-filing. According to Verizon, its filing was a response to a new set of FCC rules that went into effect one month before the deadline to file competing language in this proceeding. However, the Reciprocal Compensation Remand

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[3] The essence of Verizon's revisions is to state that Verizon will define local calling areas for the purposes of the defining "reciprocal compensation traffic" and "measured Internet traffic."

Order was released on April 27, 2001, and included the changes to the regulation on reciprocal compensation.[4] While Verizon was correct that the new regulation did not go into effect until June 14, 2001, Verizon had notice of the new rules back in April.

Furthermore, Verizon appears to contend that the Department should allow it time to test its proposed contract language through extensive negotiations with multiple CLECs and accept late-filings of language "improved" by this process. While the Department understands that the law affecting interconnection agreements is constantly changing, there must be a point in time after which no further changes are accepted so that an interconnection agreement between the parties may be finalized. The Arbitrator established that point in time as July 19th, and further filings, absent good cause for late-filing, are not recognized.[5] Therefore, for the above reasons, Sprint's Motion to Strike Verizon's August 10, 2001 revisions is granted.[6]

III. UNRESOLVED ISSUES

A. Reciprocal Compensation and Local Traffic Definition (Arbitration Issue No. 15) Part V, sections 2.6, 2.7, and Attachment 1: Definitions

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4 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("Reciprocal Compensation Remand Order").

5 If the parties wish to incorporate further language changes into their interconnection agreement, whether the result of a change of law or further negotiations, they may negotiate such changes.

6 Because of the Department's ruling on Sprint's Motion to Strike, the Department need not address the substance of Verizon's revised language.

As stated above, the FCC released its Reciprocal Compensation Remand Order on April 27, 2001. In that Order, the FCC addressed the proper intercarrier compensation for telecommunications traffic delivered to Internet Service Providers ("ISP"). The parties disagree on the appropriate contract language to reflect the FCC Order.

Verizon states that the FCC eliminated the definition of "local traffic" as the basis for payment of reciprocal compensation (Verizon Comments at 2). Verizon proposes to eliminate references to "local traffic" in the interconnection agreement and replace them with the term "reciprocal compensation traffic," which Verizon contends is more descriptive of the traffic that is eligible for reciprocal compensation (id. at 2-3).

Verizon proposes to add language to the interconnection agreement. Verizon proposes language that states that compensation for Internet traffic will be as stated in the Reciprocal Compensation Remand Order (id. at 6). In addition, Verizon proposes a definition of "Measured Internet Traffic" that is subject to the interim compensation regime set in the Reciprocal Compensation Remand Order (id.). Verizon proposes to add a section 2.7.5, that states that compensation for Internet traffic will be as stated in the applicable FCC orders and regulations (id. at 6). Verizon has also added to the section on reciprocal compensation a statement that no reciprocal compensation shall apply to Internet traffic (id. at 9).

Sprint argues that the Department's ruling that no reciprocal compensation need be made for ISP-bound traffic in the Sprint Order has been superseded by the FCC's Reciprocal Compensation Remand Order (Sprint Comments at 11). Sprint states that the FCC's Order changed the definition of traffic that is subject to reciprocal compensation, by striking the word

"local" before "telecommunications traffic" each place it appears in the regulations governing reciprocal compensation (id. at 12). Sprint's proposed interconnection language replaces the word "local" with "telecommunications," which Sprint asserts closely tracks the FCC's new rules[7] (id.).

Sprint objects to Verizon's definitions of Measured Internet Traffic and Reciprocal Compensation because they are inconsistent with the Act, and include unnecessary interpretation of the FCC rules (id.). Sprint proposes its own definition of "telecommunications traffic" which it alleges more closely tracks the FCC's new reciprocal compensation rules (id.). Sprint's interconnection language also deletes Verizon's section 2.7.2(d) which states that no reciprocal compensation shall apply to Internet traffic, and part of section 2.7.5, which includes the 2:1 ratio for identifying Internet traffic (id.).

The Department agrees with Sprint that replacing references to "local traffic" with the term "telecommunications traffic" more closely tracks the FCC's new reciprocal compensation regulation, because the FCC uses the term "telecommunications traffic" in the regulation. See 47 C.F.R. § 51.701.

The parties dispute the definitions of: Measured Internet traffic, Reciprocal Compensation and Reciprocal Compensation traffic, and telecommunications traffic. Verizon seeks to add a definition of Measured Internet traffic which defines traffic that is subject to the FCC's interim compensation regime, and differentiates that traffic from other types of traffic, including reciprocal compensation traffic. However, in an Order issued by the Department

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[7] 47 C.F.R. § 51.701.

which addressed the effect of the FCC's Reciprocal Compensation Remand Order, the Department concluded that interim rates set forth in the Reciprocal Compensation Remand Order have no effect in Massachusetts. Complaint of WorldCom Technologies, Inc., D.T.E. 97-116-F at 18 (2001). The Department further stated that the Department's policy as enunciated in D.T.E. 97-116-C applies to both existing and re-negotiated interconnection agreements during the interim period. Id. Therefore, it is unnecessary to include a definition for Internet traffic that is subject to the FCC's interim compensation regime. Accordingly, the Department deletes the disputed portion of the definition of Measured Internet traffic.

Sprint asks the Department to strike the portion of the Reciprocal Compensation definition that states that the affected traffic must originate on the network of one party and terminate on the network of the other.[8] The FCC's new rules require that telecommunications traffic that is subject to reciprocal compensation must be exchanged between a LEC and a telecommunications carrier, language that is carried over from the previous version of the regulations. 47 C.F.R. § 51.701(b). The Department has interpreted this language as requiring that traffic subject to reciprocal compensation must originate on the network of one carrier and terminate on the network of the other. See Sprint/Verizon Arbitration, D.T.E 00-54, at 16, Order on Sprint's Motion for Reconsideration; Motion to Admit Late-filed Exhibit; Motion for Official Notice (2001). Therefore, Verizon's definition of Reciprocal

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[8] The language that Sprint now disputes in the Reciprocal Compensation definition was proposed by Sprint in its original draft interconnection agreement filed with its Petition for Arbitration on June 16, 2000.

Compensation is consistent with prior orders in this docket and is accepted.[9]

Regarding Verizon's proposed definition for Reciprocal Compensation Traffic, because of our holding above that Sprint's "telecommunications traffic" more closely tracks the FCC's new rules, Verizon's definition of Reciprocal Compensation traffic is unnecessary. Therefore, this definition shall be deleted.

Sprint proposes to add a definition section for "telecommunications traffic," to replace the definitions for "local traffic"[10] and "reciprocal compensation traffic." Verizon does not address this proposed definition. The first sentence of the definition tracks the FCC's new regulation, and is therefore reasonable. Sprint does not explain the necessity of the rest of the sentences in the definition, and Verizon does not comment on them. Without more information, the Department declines to require that they be included in the interconnection agreement.

Sprint proposes to delete section 2.7.2(d) that states that no reciprocal compensation shall apply to Internet traffic. The FCC's new rules exclude from the definition of telecommunications traffic that is eligible for reciprocal compensation, among other things, "information access." 47 C.F.R. § 51.701(b)(1). In its Reciprocal Compensation Remand Order, at ¶ 44, the FCC concluded that Internet traffic falls within the category of "information

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9 Verizon's language is modified to replace the term "reciprocal compensation traffic" with "telecommunications traffic" as ruled above.

10 Sprint's draft interconnection agreement includes language defining local calling areas. This language appears to be part of the definition of "local traffic" which the parties have deleted. The Department assumes that the parties also meant to delete the paragraph on local calling areas.

access," and therefore is excluded from traffic eligible for reciprocal compensation. Verizon's proposed language that states that reciprocal compensation does not apply to Internet traffic is, therefore, reasonable. The Department declines to delete section 2.7.2(d).

Regarding the language Sprint disputes that references the 2:1 ratio for identifying Internet traffic, this paragraph is not included in the Verizon draft interconnection agreement. The Department will construe this omission as agreement between the parties that they do not intend this paragraph to be included in the interconnection agreement.

B. Collocation at Sprint's Facilities
Part III, section 2.3

Verizon requests that the Department afford Verizon the opportunity to minimize its costs of establishing points of interconnection by allowing Verizon to either collocate on Sprint's premises for the purposes of network interconnection, or permitting Verizon to maintain a non-distance-sensitive entrance facility[11] (Verizon Comments at 2).

Verizon proposes language that would grant it a right to collocate at Sprint's central office premises for the purpose of network interconnection (id. at 12). Verizon asserts that such a right would allow Verizon to deliver traffic to Sprint at Verizon's cost and avoid the need for Verizon to purchase transport from Sprint at a price that may exceed Verizon's cost to build its own facilities (at Sprint's central offices) (id.).

Sprint contends that Verizon's request for collocation rights was not an arbitrated issue

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[11] Verizon's tariff defines entrance facilities as transport from the customer designated premises to Verizon's serving wire center. M.D.T.E. No. 15, Section 1, page 12. In this instance, Verizon is referring to transport from its interconnection point ("IP") to Sprint's IP.

(Sprint Comments at 3). According to Sprint, the Act[12] imposes the duty to provide for physical collocation of equipment at the premises of the local exchange carrier on the incumbent local exchange carrier ("ILEC") such as Verizon, not on competitive local exchange carriers ("CLECs") such as Sprint (id. at 3, citing 47 U.S.C. § 251(c)(6)). Because Sprint is not an ILEC, Sprint argues that it is not required to offer collocation to Verizon, and Verizon's proposed section 2.3 should be deleted (id.).

A review of Sprint's Petition for Arbitration and Verizon's Response indicates that neither party raised collocation at Sprint's facilities as an issue in this arbitration. Verizon did include the proposed section 2.3 in the draft interconnection agreement attached to its response, and Sprint's draft interconnection agreement attached to its Petition for Arbitration shows section 2.3 in strike-out text, marked as "reserved." Sprint does not specify what "reserved" means; Sprint indicates that strike-out text was used where there was an unresolved issue (Sprint Petition for Arbitration at 5). Although the draft interconnection agreements indicate that section 2.3 was an unresolved issue, the Petition for Arbitration and the Response did not identify this section as an issue for arbitration, and the Department has not addressed this section in previous Orders in this arbitration. The Department has jurisdiction to arbitrate only those issues properly raised by the parties. See 47 U.S.C. § 252(b)(4)(A) (state commission shall limit its consideration to the issues set forth in the petition and the response); see also Arbitrator's Ruling on Assented to Motion for Extension of Time in this proceeding (June 28, 2001) (Arbitrator will not consider issues not identified in the Petition for Arbitration or

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[12] 47 U.S.C. § 151 et seq.

Response). Because the issue of collocation at Sprint's facilities was not raised in the Petition for Arbitration or in the Response, the issue is not properly before the Department, and the Department therefore declines to decide it.[13]

C. Price for Entrance Facilities Supplied by Sprint
Part V, Sections 1.3.9 , 1.5.3

Verizon asks that, if the Department does not grant it collocation rights, the Department prohibit Sprint from charging Verizon distance-sensitive charges for entrance facilities that Verizon would be required to purchase from Sprint in order to interconnect with Sprint (id. at 13). Verizon states that because Sprint provides a relatively few number of interconnection points (to which Verizon must transport its originating traffic), Verizon may have to provide transport over a significant distance when Verizon must purchase entrance facilities from the point of interconnection to Sprint's IP (id. at 14). Verizon alleges that because Verizon does not have the option of deciding whether it will establish interconnection arrangements with Sprint, it is inequitable to allow Sprint to impose distance-sensitive charges for those entrance facilities purchased by Verizon (id.). Verizon's proposed language restricts Sprint to charging no more than a non-distance-sensitive entrance facility charge for transport of traffic from a Verizon interconnection point to a Sprint interconnection point (id. at 13).

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[13] The Department previously addressed the question of whether a CLEC may be required to provide collocation to Verizon. In MediaOne/Bell Atlantic Arbitration, D.T.E. 99-42/43, 99-52, at 50 (1999), the Department stated that the specific obligation to provide collocation applies only to ILECs, 47 U.S.C. § 251(c)(6). The Department concluded in that proceeding that the CLEC was not required by the Act to offer Verizon, formerly Bell Atlantic, collocation at its facilities.

Sprint styles Verizon's proposed language as a "GRIP-like alternative"[14] that would force Sprint to bear a disproportionate share of the costs of carrying traffic between the parties (id. at 5). Sprint argues that Verizon's proposed sections 1.3.9 and 1.5.3 cause the same cost-shifting as GRIP (id. at 10). Sprint contends that these GRIP provisions are inconsistent with FCC and Department Orders (id. at 7, 10). Sprint recommends that each party be responsible for transporting traffic to the same relative point on the other's network, and that each party be financially responsible for ensuring that adequate facilities are in place to deliver that traffic (id. at 6). Sprint argues that capping its transport charges at a non-distance-sensitive entrance facility rate, regardless of the transport distance, would ignore the distance sensitivity of transport and would not reimburse Sprint for its transport costs (id. at 11). Sprint concludes that sections 1.3.9 and 1.5.3 should not be included in the interconnection agreement (id.).

This issues comes before the Department in the same posture as the collocation issue above; it appears for the first time in this phase of the proceeding. Neither party raised the price of entrance facilities supplied by Sprint as an issue in the Petition for Arbitration or Response. The disputed language in sections 1.3.9 and 1.5.3 appears in strikeout in Sprint's original draft interconnection agreement, and appears in Verizon's draft interconnection

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[14] Verizon's "geographically relevant interconnection points" ("GRIP") proposal required all local exchange carriers to exchange local traffic with one another at a location that is within reasonable geographic proximity to the rate center of the terminating end-user customer. Because Verizon's GRIP proposal required CLECs to establish additional interconnection points at Verizon's tandem and end offices and does not allocate transport costs in a competitively neutral manner, the Department rejected the GRIP proposal. See Bell Atlantic Tariffs M.D.T.E. Nos. 14 and 17, D.T.E. 98-58, at 135 (2000).

agreement with the notation "issue" after draft section 1.5.3. Although the draft interconnection agreements indicate that sections 1.3.9 and 1.5.3 contained unresolved issues, the Petition for Arbitration and the Response did not identify those sections as issues for arbitration, and the Department has not addressed this issue in previous Orders in this arbitration.[15]

The effect of Verizon's decision to raise this issue so late in the proceeding is that we have no evidentiary record on which to base our decision on this issue. Verizon asks for a limitation on distance-sensitive charges because Verizon argues that it may incur additional transport costs as a result of Sprint's choice of location for its interconnection points. However, we have no evidentiary record on which to determine whether Verizon in fact will incur the extra charges it alleges, or to assess whether the remedy proposed by Verizon is appropriate in light of those alleged additional costs.[16]

The Department has jurisdiction to arbitrate only those issues properly raised by the

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[15] In its Final Position Statement, Verizon raised the fact that it must purchase either transport or collocation facilities from Sprint to meet its interconnection obligations to Sprint under Arbitration Issue No. 6, "rates and charges." However, Verizon never requested that the Department require Sprint to offer collocation to Verizon, or require Sprint to provide non-distance-sensitive entrance facilities to Verizon. The question raised in Arbitration Issue No. 6 was whether the rates Sprint charges to Verizon should be capped at Verizon's rates for the same services, absent a showing by Sprint that its rates are reasonable. This issue was resolved consistent with Verizon's recommendation. See Sprint/Verizon Arbitration, D.T.E. 00-54, at 18 (2000).

[16] In D.T.E. 98-57, Verizon produced a cost study in support of its GRIP proposal to quantify additional transport costs it would incur to transport and switch a local call from a Verizon end user to a CLEC interconnection point. The Department rejected Verizon's cost study and found that Verizon did not prove that it incurs additional transport costs to deliver traffic to CLECs. Bell Atlantic Tariffs M.D.T.E. Nos. 14 and 17, D.T.E. 98-58, at 135 (2000).

parties. See 47 U.S.C. § 252(b)(4)(A) (state commission shall limit its consideration to the issues set forth in the petition and the response); see also Arbitrator's Ruling on Assented to Motion for Extension of Time in this proceeding (June 28, 2001) (Arbitrator will not consider issues not identified in the Petition for Arbitration or Response). Because the issue of the price for entrance facilities supplied by Sprint was not raised in the Petition for Arbitration or in the Response, the issue is not properly before the Department, and the Department therefore declines to decide it.[17]

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[17] The Department has previously addressed responsibility of transport of intercarrier calls. "Carriers are responsible to provide transport or pay for transport of their originating calls, including reciprocal compensation, between their own originating and the other carrier's terminating end-user customers." Bell Atlantic Tariffs M.D.T.E. Nos. 14 and 17, D.T.E. 98-58, at 132 (2000). See also Greater Media Telephone/Bell Atlantic Arbitration, D.T.E. 99-52, at 24 (1999) (Verizon must pay full tariffed rate (i.e., both the fixed rate and mileage-sensitive rate components) for entrance facilities if it elects to purchase entrance facilities from the CLEC). Of course, the entrance facility rate that Sprint may charge Verizon may be no more than Verizon's rate, absent a showing by Sprint that a higher rate is reasonable. Sprint/Verizon Arbitration, D.T.E. 00-54, at 18 (2000).

IV. ORDER

After due consideration, it is

ORDERED: That Sprint's Motion to Strike is hereby granted; and it is

FURTHER ORDERED: That the issues under consideration in this arbitration be determined as set forth in this Order; and it is

FURTHER ORDERED: That the parties incorporate the determinations herein into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) of the Act, within 21 days of the date of this Order.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner